UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, Administrator, *et al.* Plaintiffs,	:	
vs.	:	C.A. No. 04-312-L
JEFFREY DERDERIAN, *et al.* Defendants.	:	

PLAINTIFFS' REPLY MEMORANDUM TO THE MEMORANDA OF ESSEX INSURANCE COMPANY AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON IN SUPPORT OF THEIR OBJECTION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE MASTER COMPLAINT

Procedural History

Plaintiffs have moved for leave to file a First Amended Master Complaint, with a proposed mechanism for adoption of said Complaint by non-parties to the above-captioned matter. Objections were filed by Defendants Essex Insurance Company and Certain Underwriters at Lloyd's, London. Essex objected on the basis of "futility," asserting identical arguments to those briefed and argued by it in support of its presently-pending Motion to Dismiss under Fed.R.Civ.P. 12(b)(6). Co-defendant, Certain Underwriters at Lloyd's, London, filed a single-page Memorandum which simply adopts the arguments of Essex in opposition to the amendment. Accordingly, this Memorandum is addressed to those arguments raised in Essex' Memorandum, but are equally applicable to the objection of Lloyd's.

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Standard Of Review

As this Court held in Almeida v. United Steel Workers of America International Union, AFL-CIO, 50 F.Supp.2d 115, 120-21 (D.R.I. 1999), the legal standard for determining the futility of an amendment under Fed.R.Civ.P. 15 is the same as that applied to a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6): "Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted." Id. Because the "futility" issue involves the same standard of review as Essex' 12(b)(6) motion, and because those issues have been briefed (and argued) extensively, Plaintiffs hereby incorporate by reference their memorandum and oral argument in opposition to Essex' Rule 12(b)(6) Motion to Dismiss.

Effect Of Proposed Amendment As To Essex

Plaintiffs, as explained in their 12(b)(6) memorandum and oral argument, believe that the original Master Complaint states a claim against Defendant Essex. However, in an excess of caution, Plaintiffs sought to amend their Complaint as to Essex by adding two substantive paragraphs and by changing the method by which previous allegations are incorporated into the Essex count.

Specifically, Plaintiffs' proposed First Amended Master Complaint adds the following two new paragraphs.

> 657. Defendants Essex, Multi-State and High Caliber, in undertaking to perform said inspections, recognized or should have recognized that the competent performance of the inspections was necessary for the protection of third persons, including Plaintiffs.
>
> 658. Essex' insured, Michael Derderian, relied upon the results and recommendations of said negligently performed inspections.

The new paragraphs dovetail with the Restatement 2d of Torts §324A(c), upon which Plaintiffs rely (and relied in opposing Essex' Motion to Dismiss). Specifically, that section of the Restatement provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if
>
> * * *
>
> (c) the harm is suffered because of reliance of the other . . . person upon the undertaking.

The additional allegations of paragraphs 657 and 658 simply reinforce the twin legs of foreseeability and reliance which form the basis of Restatement 2d §324A(c).

Additionally, the proposed Amended Complaint's allegations against Essex incorporate only those other allegations in the Complaint pertaining to the Plaintiffs and to Essex in order to bolster the complaint against any argument that alternative factual allegations should preferably be pleaded in the alternative or in separately numbered counts. (Such separation is not even necessary under Fed.R.Civ.P. 8(e)(2)("either in one count or defense or separate counts or defenses"); however, this separation was undertaken in the Amended Complaint, again, in an excess of caution.)

This Is Plaintiffs' First Proposed Amendment To The Complaint

We must take issue with the assertion in Essex' Memorandum in Support of Essex Insurance Company's Objection to Motion to Amend Master Complaint at 2 that "Plaintiffs' Amended Master Complaint can be considered a second 'amendment' of complaints previously filed by various plaintiffs in this action." In

fact, the proposed First Amended Master Complaint is Plaintiffs' first proposed amended complaint of any kind and follows within five months removal of the original Master Complaint from state superior court to this Court. Whether by inadvertence or design, Essex' mischaracterization of the proposed amendment appears to be an attempt to characterize the pending Motion to Amend as somehow repetitive or untimely. Given the very early procedural stage of this case, its near-unprecedented complexity and the complete absence of discovery to date, the proposed Amended Complaint is, we would submit, a model of diligence.

The Amended Complaint Satisfies §324A(c)'s Reliance Requirement

In attempting to advance its "futility" argument, Essex' Memorandum, like its 12(b)(6) memoranda, argues the strawman that The Station's patrons were unaware of Essex or its inspection and could not have relied upon the undertaking. As explained in earlier memoranda and argument, however, reliance of the insured is sufficient under §324A(c). Huggins v. Aetna Casualty & Surety Co., 264 S.E.2d 191 (Ga. 1980); Restatement 2d, Torts, §324A(c), Comment e.

Finally, as to Essex' argument raised here and in its 12(b)(6) motion that its self-serving policy language is somehow dispositive of any reliance by the insured, the cases cited in Plaintiffs' Memorandum of Law in Opposition to the 12(b)(6) Motion, including Hill v. U.S. Fidelity & Guaranty Co., 428 F.2d 112 (5th Cir. 1970), cert. denied 400 U.S. 1008, 27 L.Ed.2d 621, 91 S.Ct. 564 (1971) and Cleveland v. American Motorists Ins. Co., 163 Ga.App. 748, 295 S.E.2d 190 (1982), directly address this issue. Specifically, under Hill, supra, in order for notice to the insured to defeat a §324A claim, it must be established under the totality of circumstances that notice made it "unambiguously clear" that the insured may or may not rely

upon an inspection. Here, the policy language in question is not even part of the Complaint and, accordingly, need not be considered under the 12(b)(6)/"futility" standard. Even if it were to be considered, however, there has been no discovery as to whether the policy language was ever communicated to an insured, much less when or how. Neither has there been any discovery concerning other communications surrounding the inspection in question.[1] Finally, the very timing of the inspection, seven months into a twelve-month policy term, belies the policy recitation that inspection is for "deciding whether to insure the risk," upon which Essex relies. It cannot be said at this juncture, before any discovery, that under the totality of the circumstances Essex made it "unambiguously clear" to its insureds that it could not rely upon the inspection.

Conclusion

For the same reasons that Essex' Rule 12(b)(6) Motion should be denied, so should Essex' (and Lloyd's) "futility" arguments be rejected, and Plaintiffs' Motion for Leave to File a First Amended Master Complaint be granted.

[1] If an insurer's advertising or communications with its policyholders suggest that its inspection services may relieve the insured of burdens of inspecting its own facilities, it has undertaken to render a service to its insured under §234A. Patton v. Simone, 626 A.2d 844 (Del. Super. 1992), citing Smith II v. Allendale Mutual Ins. Co., 410 Mich. 685, 303 N.W.2d 702, 712 (1981).

Respectfully,

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CERTIFICATION

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